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No. 92-52

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

COLUMBIA GORGE UNITED--
PROTECTING PEOPLE AND PROPERTY,
Petitioner,

v.

EDWARD R. MADIGAN, JR., Secretary of Agriculture
of the United States; and the
COLUMBIA RIVER GORGE COMMISSION,
Respondents,

and

FRIENDS OF COLUMBIA RIVER GORGE,
Intervenor-Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY OF PETITIONER, COLUMBIA GORGE UNITED--PROTECTING PEOPLE AND PROPERTY

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INTRODUCTION

New truths, principles, and guiding philosophies are discovered or popularized in every era. Some of these principles and truths, such as women's suffrage or civil rights, have withstood the test of time. Others, such as manifest destiny or the inevitability of the fall of capitalism, have not. It is not and never has been the role of this Court

to pick and choose winners and losers in the contest of emerging political paradigms. Instead, it has been the duty of this Court to judge whatever stratagems Congress throws out to achieve its current philosophical and political objectives against the principles of the Constitution. That is not to say that our understanding of the Constitution has not evolved and changed; to varying degrees it has. And this is not to say that the meaning of the Constitution is always clear in regard to modern demands; it is not. But those caveats do not lessen the importance of this Court's role to judge all new schemes of governance that implicate a change in the constitutional way of doing things, even (if not especially) when the goals sought to be achieved are part of a new emerging "universal" truth.

So it is with the importance of protecting the environment. The protection of the environment is a new paradigm that appears (fortunately) to be here to stay. But that does not mean this Court should avoid focusing on questionable schemes to meet the newly popular objectives of environmentalism. That does not mean that the state governments must abandon their sovereignty to the federal.

Yet when the respondent Columbia River Gorge Commission (Commission) begins its brief in opposition with a lengthy description of the flora and fauna of the Gorge it is doing so with a particular purpose in mind. The Commission hopes to convince this Court that the environment of the Gorge is so important that this Court's attention to the details of the constitutionality of the congressional scheme at issue may be less focused than usual. The Commission is surrounding a highly questionable congressional scheme with a gauze of reverence to natural beauty in the hope that this Court will not see the infirmities of the statute.

Both the Commission and the federal respondent have avoided facing up to the fact that the Columbia River Gorge National Scenic Area Act is unique in American legislative schemes. They have avoided acknowledging that this Act treads on and beyond the outward limits of constitutionality.

They are hoping this Court will choose not to consider the implications of this Act. For the reasons stated below, this Court should not be diverted by the arguments of respondents.

I
IT IS THE FEDERALIZATION OF LOCAL LAND USE PLANNING THAT MAKES THE STATUTE UNCONSTITUTIONAL

In order to convince this Court that this case is not worthy of certiorari, the Commission tries to minimize the importance of the Gorge Act and misstates the core of petitioner's objections to that Act. In a nutshell, the Commission argues that Columbia Gorge United's (CGU) case is designed to destroy all regional land use planning. For example, the Commission argues in its brief at 15 that "petitioner['s case is] to rid the Gorge of a regional planning entity." Similarly, the Commission claims that CGU wishes "to turn back the clock to the time when land use planning in the Gorge was a purely local affair." Respondent's Brief in Opposition (Commission Brief) at 11.

There is no basis for this straw man characterization of CGU's argument. In this petition CGU is not objecting to land use planning in the Gorge whether it be by the state or local government. CGU strenuously objects, however, to the *federalization* of local zoning decisions and the utilization of a "compact" to create a commission that falls outside the parameters of the Constitution.

The Commission argues that regional land use planning was inevitable and would have occurred with or without the federal legislation. Commission Brief at 15. This case, however, is not about a hypothetical compact where two states merely decide to get together to cooperate on land use planning on nonfederal lands. It is about existing legislation that deeply insinuates the federal government into local land use planning in a manner beyond that allowed by the Constitution. Thus, when the Commission claims that the

states of Washington and Oregon could have entered into a compact dealing with regional land use planning, *id.*, that assertion is irrelevant to what actually is being challenged in this case.[1]

CGU argued below and presents the argument in its petition for certiorari that the *federalization* of land use planning in the Gorge renders the entire act invalid. *See, e.g.*, CGU's reply brief before the Ninth Circuit at 21; CGU's petition for certiorari, *passim*. To be specific, because all sections of the Gorge Act purport to be conditions for a compact, all sections violate the Compacts Clause and cannot be deemed as consent to a compact. Concomitantly, none of the state statutes which purport to authorize the states to enter into a compact actually serve to create a valid compact and are without force and effect. *See New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120, 154 (1992) (unconstitutional acts cannot be "ratified by the 'consent' of state officials").

The federal government asserts power over a variety of activities in the Gorge. It bases this power on certain enumerated powers described in the Constitution. It is a violation of the Constitution for the federal government to act

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[1] The Ninth Circuit's finding that the alleged compact in this case requires federal approval has not been made an issue in CGU's petition or questions presented. In any event, because the Commission has the power to enact a regional plan and strict land use controls over National Forest land, and because federal agencies must act in a way that is "consistent" with the act, 16 U.S.C. § 544l(d), congressional consent is required. *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978). CGU's assertion that the federal act is invalid necessarily implies that the compact itself is invalid.

If the states were to design a new compact that does not require the federal government to exercise authority not found in the Constitution and that did not impinge on federal sovereignty, then such a compact and accompanying state statutes might survive scrutiny. That, of course, is not the tenor of the present case.

outside of its specific enumerated powers. *See* U.S. Const. Amend. X. Because these enumerated powers do not in fact provide the authority assumed, various sections of the Gorge Act cannot be justified.[2]

Nor is CGU arguing that two states cannot cooperatively solicit and utilize "the assistance of the federal government." *See* Commission's Brief at 12. That is not what has happened here. Rather the federal government has mandated its "assistance" on the state governments which have had no practical choice but to accept that assistance.

Thus it is not the existence of *state* involvement in land use planning that CGU argues is unconstitutional, but the insinuation of the federal government into that process.[3]

II

THE COMPACT IS INVALID

The creation of the unique "compact" in this case, which is unprecedented in the scope of federal participation in the creation of all the details of the compact and in the coercive nature of the states' "agreement" to the compact, merits this Court's attention. If the Compacts Clause is not to become

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[2] For example, there is no Commerce, Property, or Spending Clause justification for those sections that purport to grant the Secretary various levels of authority over nonfederal lands, including Sections 544a, 544b, 544c, 544d, 544e, 544f (except 544f(a) and (b)), those subsections of 544g referring to acquisition "needed to achieve the purposes of Sections 544 to 544p," 544h, 544m, 544n, and 544o(d) and (e). Additionally, there is no Property Clause justification for Sections 544i, 544j, 544k, and 544l and no Spending Clause authority for Section 544k.

[3] The Commission suggests at the end of its brief that the case may be moot because a final plan has superseded the interim plan which was created by the Secretary. This is nonsensical because the federalization of the Gorge continues with the final plan: portions of the plan were created by the federal government, it was subject to federal approval, future local land use ordinances remain subject to federal approval, and subsequent changes will be subject to federal approval. *See, e.g.*, 16 U.S.C. §§ 544d, 544f. The case is not moot.

the carte blanche of the next century for federal involvement in areas beyond its enumerated powers, this Court should carefully determine whether the parameters of the Compacts Clause have been exceeded in this case.

The Commission argues that the states were not coerced into accepting the compact because it was the product of "voluntary, cooperative federal-state action." Commission Brief at 17. It was not. The Ninth Circuit made the bald assertion that the District Court was not "clearly erroneous" when it found the compact was voluntary. Opinion at A-4 in petitioner's appendix. The Ninth Circuit, however, completely failed to address CGU's arguments that the extensive power of federal permitting in the region would have made the state's failure to adopt the compact a sort of self-inflicted economic capital punishment. That is because communities with wetlands, federal timber land, federal grazing land, and so on within the General and Special Management Areas must have federal permits to survive. The statute authorizes the federal government to stop issuing permits. The exercise of this power, used to achieve the goals of the Act, could have brought economic activity to a standstill. While the federal government may have legitimate power to require permits for activities such as wetland development, it cannot use this legitimate power for an extraneous *illegitimate* end: the coercion of states to adopt a compact that gives the federal government powers beyond those enumerated in the Constitution. *See* David E. Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMMENTARY 93, 98 (1985). Thus, not only did the Ninth Circuit fail to consider the matter of coercion as a factual matter, it also failed to recognize the legal infirmity

of the United States' use of its legitimate permitting authority to force the adoption of a compact.[4]

The federal respondent, the Secretary of Agriculture, argues that Congress validly gave its consent to a compact entered into by Oregon and Washington and that there are *no* procedural limitations upon the manner by which Congress may grant its consent.[5] Brief of the Federal Respondent in Opposition (Federal Respondent's Brief) at 8. The Secretary is ignoring the realities of this case. The entire "compact," down to its most minute detail, including "conditions" that give the federal government unprecedented powers beyond those enumerated in the Constitution, was completely the product of *federal* legislation.[6]

In the context of other constitutional provisions, this Court has made it clear that activities that are supposed to originate with other branches of government cannot be taken over by Congress--even if the other branch continues to play a role in the activity. Thus, as explained on Page 28 of CGU's petition, this Court has held that the Appointments Clause and the Treaty Clause prevent Congress from making

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[4] This is different from the situation where the federal government utilizes its spending power to convince states to adopt federally inspired regulations because states can always take the money or leave it. They cannot, however, watch economic activity grind to a halt because otherwise legitimate but federally regulated activities are halted pending adoption of a compact.

[5] The Commission writes that CGU is arguing that Congress cannot give its advance consent to the formation of a compact. *See* Commission Brief at 11 n.7. That is, of course, wrong. CGU recognizes that Congress may give advance consent to a compact. *Cuyler v. Adams*, 449 U.S. 433, 440-41 (1981). Here, however, CGU argues that the manner in which Congress gave its consent, and the invalid conditions attached to that consent, make the compact a nullity.

[6] *See* Petition for Writ of Certiorari at 3 n.2 for descriptions of the legislative process used to create the compact.

appointments or negotiating treaties. Just as Congress cannot draft a treaty in its entirety in advance and suggest that the executive branch then sign it, there must be inherent procedural limitations on the exercise of Congress' power to "approve" compacts that are supposed to be the product of the state sovereigns. This Court should use the opportunity presented by CGU's petition to explore whether or not the same sort of prudential limitations placed on Congress' authority to approve treaties and appointments should apply to the approval of compacts as well.

III

THIS COURT SHOULD CONSIDER WHETHER THE NINTH CIRCUIT HAS STRETCHED CONGRESS' COMMERCE CLAUSE AUTHORITY BEYOND ITS CONSTITUTIONAL LIMITATIONS

The Secretary has ignored the basis of CGU's objection that Congress lacks power under the Commerce Clause to regulate local land use planning. The Secretary, instead, argues only that there is a "rational basis" to find that the regulation will affect interstate commerce. The purpose of this statute was not to regulate commerce but was to enhance scenery and recreation. *See* CGU's petition at 10-11. However, under the rational basis to affect commerce test, any and every activity in the universe could be regulated because it would affect commerce. Because this regulation is not a means to effectuate the legitimate end of regulating commerce, it cannot be sustained. *See* Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMMENTARY at 98. With this case this Court can explain whether or not the Commerce Clause relates to regulations that actually are designed to affect commerce or whether all that is required is a talismanic connection to commerce. This Court can also decide the validity of the Ninth Circuit's new Commerce Clause test--that *virtually anything* can be regulated by Congress in an area Congress deems to be of "critical

national significance." Ninth Circuit Opinion, reproduced in petitioner's appendix, at A-7.

IV
NEW YORK v. UNITED STATES APPLIES TO THIS CASE

The federal government attempts to differentiate this case from *New York v. United States*, by claiming that the "statute does not obligate the States to do anything much less enact a regulatory scheme." Federal Respondent's Brief at 7. Similarly, the Commission argues that *New York* does not apply because the states "voluntarily agreed" to the compact. Commission Brief at 19. Respondents are ignoring reality. Congress created the compact and forced the state to "adopt" it and abide by its terms at risk of suffering severe penalties in the form of permit denials and federal condemnation of state and private land. 16 U.S.C. §§ 544g, 544l, 544n.

Pursuant to the statute at issue in *New York*, some states had voluntarily entered into compacts for the disposal of nuclear wastes including the "take title" provisions. These particular compacts were not struck down in *New York*. As this Court correctly noted, there is nothing wrong with a state's voluntary agreement to regulate an area that *could* be regulated by the federal government. 120 L. Ed. 2d at 144-45. The other states did not argue that their compacts were invalid in *New York*. More importantly, under the terms of the radioactive waste disposal statute in *New York*, the federal government was *not* using the threat of permit denials and the like to force the states to enter into compacts which would have significantly increased federal jurisdiction over activities that were never before regulated by the federal government and for which no enumerated power to regulate exists. Rather, the problem in *New York* involved the choices left to states that were unable or unwilling to enter regional compacts. Those states had the choice of accepting the "take title" provisions or regulating waste according to the instructions of Congress. 120 L. Ed. 2d at 150. This

Court found the choice to be unacceptable because "the take title incentive does not represent the conditional exercise of any congressional power *enumerated in the Constitution.*" 120 L. Ed. 2d at 150 (emphasis added).

The same choice is presented in this case. A state must either consent to giving the federal government powers beyond those enumerated in the Constitution or find itself subject to a coercive federal regulatory regime (with permit denials) which is designed to achieve goals outside the enumerated powers.

CONCLUSION

Congress may use whatever means it has available which are necessary and proper to effectuate an *enumerated* end. This case presents the unique circumstance of the federal government using a combination of threats and the Compact Clause to extend its jurisdiction *beyond* the authority of its enumerated powers.

This Court needs to take a long and careful look at what Congress has wrought with the Columbia Gorge Act. Certiorari should be granted.

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Respectfully submitted,

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